ORIGINAL

Supreme Court, U.S.
FILED
FEB 1 1994
OFFICE OF THE CLERK

No. 93-753

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

****

STATE OF NORTH CAROLINA,
Petitioner,

v.

KENNETH MICHAEL BRYANT
Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

RESPONDENT BRYANT'S BRIEF IN OPPOSITION

****

Gordon Widenhouse*
Assistant Appellate Defender

Janine Crawley
Assistant Appellate Defender

Office of the Appellate Defender
1905 Meredith Drive, Suite 200
Durham, North Carolina 27713
(919) 560-3282

COUNSEL FOR RESPONDENTS

Counsel of Record

23 pp

QUESTION PRESENTED

WHETHER NORTH CAROLINA PROPERLY HELD THAT AN INSTRUCTION ON REASONABLE DOUBT WHICH HAD THE SAME DEFECTS AS THE INSTRUCTION FOUND UNCONSTITUTIONAL IN CAGE V. LOUISIANA VIOLATED DEFENDANT'S RIGHT TO THE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT?

TABLE OF CONTENTS

QUESTION PRESENTED ii

TABLE OF CONTENTS iii

TABLE OF CASES AND AUTHORITIES iv

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS WHY A WRIT SHOULD NOT ISSUE 5

I. NORTH CAROLINA PROPERLY APPLIED BOYDE V. CALIFORNIA IN HOLDING THAT AN INSTRUCTION ON REASONABLE DOUBT, WHICH HAD THE SAME DEFECTS AS THE INSTRUCTION FOUND UNCONSTITUTIONAL IN CAGE V. LOUISIANA, VIOLATED DEFENDANT'S RIGHT TO THE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT 5

II. THE NORTH CAROLINA SUPREME COURT NEITHER MISAPPLIED SULLIVAN V. LOUISIANA NOR ABANDONED THE STANDARD OF REVIEW FOR JURY INSTRUCTIONS SET FORTH IN BOYDE V. CALIFORNIA; NORTH CAROLINA PROPERLY RELIED ON SULLIVAN IN HOLDING THAT CAGE ERROR WAS PLAIN ERROR AS A MATTER OF STATE LAW 10

CONCLUSION 13

TABLE OF CASES AND AUTHORITIES

CASES

Boyde v. California,
494 U.S. 370 (1990) 5, 10

Bradford v. State,
261 Ga. 833, 412 S.E.2d 534 (1992) 9

Cage v. Louisiana,
498 U.S. 39 (1990) 4,5

Commonwealth v. Beldotti,
409 Mass. 553, 567 N.E.2d 1219 (1991) 9

Estelle v. McGuire,
__ U.S. __, 112 S. Ct. 475 (1991) 7,10

Fay v. Noia,
372 U.S. 391 (1963) 13

Henry v. Mississippi,
379 U.S. 443 (1965) 13

Herb v. Pitcairn,
324 U.S. 117 (1945) 13

People v. Jennings,
279 Cal. Rptr. 780, 807 P.2d 1009, *cert. denied*,
__ U.S. __, 112 S. Ct. 443 (1991) 9

People v. Melito,
601 N.Y.S.2d 745 (A.D. 4 Dept. 1993) 9

People v. Sandoval,
14 Cal. Rptr. 2d 342, 841 P.2d 862 (1992), *cert. granted in part*, __ U.S. __, 114 S. Ct. 40 (1993) 8

Sandoval v. California,
No. 92-9049 5

Starr v. State,
201 Ga. App. 73, 410 S.E.2d 180 (1991) 9

State v. Bryant,
334 N.C. 333, 432 S.E.2d 291 (1993) ..... passim

State v. Hammonds,
241 N.C. 226, 85 S.E.2d 133 (1954) 7

State v. Hoffman,
123 Id. 638, 851 P.2d 934 (1993) 9

State v. Manning,
305 S.C. 413, 409 S.E.2d 372 (1991), *cert. denied*,
__ U.S. __, 112 S.Ct. 1282 (1992) 9

State v. Montgomery,
331 N.C. 559, 417 S.E.2d 742 (1992) 8

State v. Morman,
505 N.W.2d 593 (Minn. 1993) 9

State v. Odom,
307 N.C. 655, 300 S.E.2d 375 (1983) 12

State v. Williams,
313 Or. 19, 828 P.2d 1006, *cert. denied*, __ U.S. __,
113 S. Ct. 171 (1992) 9

State v. Williams,
334 N.C. 440, 434 S.E.2d 588 (1993) 1,7

State v. Young,
853 P.2d 327 (Utah 1993) 9

Sullivan v. Louisiana,
___ U.S. ___, 113 S. Ct. 2078 (1993) 7,10

United States v. McCaskill,
676 F.2d 995, 1002 (4th Cir.), *cert denied*,
459 U.S. 1018 (1982) 12

OTHER AUTHORITY

N. C. Rule of App. Proc. 10(c)(4) 12

No. 93-753

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1993

****

STATE OF NORTH CAROLINA,
Petitioner,

v.

KENNETH MICHAEL BRYANT
Respondent.

****

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH CAROLINA

****

RESPONDENT BRYANT'S BRIEF IN OPPOSITION

****

Respondent, Kenneth Michael Bryant, respectfully opposes and requests this Court to deny the Petition for Writ of Certiorari filed by petitioner seeking review of the decisions by the Supreme Court of North Carolina. *See State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993); *State v. Williams*, 334 N.C. 440, 434 S.E.2d 588 (1993). Petitoner joined *State v. Williams* and *State v. Bryant*, under Rule 12.2 in its Petition for a Writ of Certiorari. Respondents are filing separate Briefs in Opposition. Respondent Bryant incorporates herein by reference the Brief in Opposition filed by Respondent Williams.

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Pursuant to Rules 15.2 and 24.2, these items are omitted since respondent is satisfied with petitioner's statements of the OPINIONS BELOW, JURISDICTION, AND CONSTITUTIONAL AMENDMENTS AND STATUTORY PROVISIONS.

STATEMENT OF THE CASE

Respondent Kenneth Michael Bryant was convicted of one count of first-degree murder for the shooting death of Mr. Bryant's estranged wife's boyfriend. Respondent was sentenced to life imprisonment. The state relied primarily on two pieces of evidence: (1) a questionable eye-witness identification of respondent running across a field close to the victim's trailer just after the witness heard a gunshot; and (2) the testimony of an accessory, obtained in exchange for immunity from prosecution.

The eye-witness, Charles Myers, testified at about 10:30 p.m. on December 30, 1989, he was conversing with a friend outside a bar, near the victim's trailer, when he heard a gunshot. About forty-five seconds later Myers saw a slender man wearing a checked shirt run past him at a distance of about ten feet; the man had approached from a cornfield. A short time later, the victim's girlfriend (who was respondent's estranged wife) arrived home and began screaming; Myers crossed the street to investigate and saw the victim lying in the doorway of the trailer. When police arrived, Myers identified the runner to authorities as respondent. Myers' identification of

respondent was suspect for three reasons. First, Myers identified the runner as respondent after having mixed with the victim's friends and family outside the victim's trailer following the shooting. The victim's friends and family uniformly were blaming respondent for the shooting. Second, Myers repeatedly described the runner as wearing a checked shirt and others who spent time with respondent that night all agreed that respondent was wearing a distinctive black shirt with a white design on the pocket. Finally, a shoeprint found in the cornfield from which the runner approached did not match the shoes which respondent was wearing when arrested.

Respondent's girlfriend, Cheryl Marlowe, testified under a grant of immunity that she spent the evening of December 30, 1989 with respondent. Marlowe and respondent visited a bar and then drove around the back roads of Nash County. At about 10:30 p.m., at a location near the victim's trailer, respondent left the car for about five minutes. Marlowe testified that after respondent returned to the car, he unloaded a gun and told Marlowe that he had gone to the victim's trailer to speak with his estranged wife, that he and the victim both grabbed the front door handle and struggled over opening the door, and that respondent finally stuck the gun through the door and fired.

Marlowe was thoroughly impeached on cross-examination. She had given four prior inconsistent statements to police officers and an additional prior inconsistent statement to defense counsel. Two out of her four prior statements to police made no mention of a gun. In her prior statement to defense counsel, Marlowe denied that respondent had a gun on the night of the shooting. Marlowe's version of events also was inconsistent with the ballistic evidence. In one of her statements, Marlowe claimed that defendant was carrying a .22 or .25 caliber pistol, yet the ballistics showed that the victim was shot with a .40 caliber gun. Moreover, the physical evidence showed that the

gunshot was fired through the closed door of the victim's trailer, not through an opening in the door as implied in Marlowe's account.

The state also introduced evidence showing that respondent and the victim had been involved in a prior altercation in which respondent had been seriously injured and that respondent had threatened the victim on the night of the shooting by stating to several patrons of a bar that he "had something" for the victim.

Respondent presented a strong alibi. Respondent acknowledged that he had gone out with Cheryl Marlowe earlier in the evening, but maintained that by the time of the shooting, he was at his sister's house playing cards. One of the persons who testified to this alibi was respondent's brother-in-law who had no reason to protect respondent; respondent previously had sold this witness stolen goods and had caused the witness to serve time in jail.

Respondent appealed his conviction and the North Carolina Supreme Court awarded a new trial because the instruction on reasonable doubt given by the trial court was unconstitutional under *Cage v. Louisiana*, 498 U.S. 39 (1990). *See State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993).

REASONS WHY A WRIT SHOULD NOT ISSUE

I. NORTH CAROLINA PROPERLY APPLIED BOYDE V. CALIFORNIA IN HOLDING THAT AN INSTRUCTION ON REASONABLE DOUBT, WHICH HAD THE SAME DEFECTS AS THE INSTRUCTION FOUND UNCONSTITUTIONAL IN CAGE V. LOUISIANA, VIOLATED DEFENDANT'S RIGHT TO THE DUE PROCESS OF LAW UNDER THE FOURTEENTH AMENDMENT.

The decision below held that an instruction on reasonable doubt violated due process because the instruction contained a combination of terms that was virtually identical to the combination prohibited in *Cage v. Louisiana*, 498 U.S. 39 (1990) and there was a reasonable likelihood that the jury interpreted the challenged instruction in an unconstitutional way. *See Boyde v. California*, 494 U.S. 370 (1990). The instruction in the instant case defined reasonable doubt as "an honest substantial misgiving," twice equated proof beyond a reasonable doubt with moral certainty of guilt, and contained other confusing archaic language. The instruction below is distinguishable from the instruction in *Sandoval v. California*, No. 92-9049, recently considered by this Court; the challenged instruction in the case below contained problematic terms in addition to references to moral certainty. The decision below constituted a proper and noncontroversial application of *Cage* and does not require review by this Court.

Cage held that the following instruction was constitutionally defective:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt,

> however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty*. 554 So. 2d 39, 41 (La. 1989) (emphasis added)

Cage v. Louisiana, 498 U.S. at 40. This instruction is unconstitutional because, "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the reference to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." *Id.* at 41.

The case below, *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993) held that a definition of reasonable doubt which contained a combination of terms nearly identical to the combination condemned in *Cage*, and which suffered from the same defects as the definition in *Cage,* violated due process. The challenged instruction stated:

> When it is said that the jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or *satisfied to a moral certainty of the truth of the charge*.
>
> If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that *they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise, not.*

> *A reasonable doubt,* as that term is employed in the administration of criminal law *is an honest substantial misgiving* generated by the insufficiency of the proof.

State v. Bryant, 334 N.C. at 339, 432 S.E.2d at 294-95.[1] Petitioner incorrectly implied that the only alleged flaw in the challenged instruction was that it equated proof beyond a reasonable doubt with moral certainty of guilt. Petition at 11-12, 13-14. Unlike the instructions in *Sandoval v. California*, No. 92-9049, which were challenged only on the ground that the instructions equated proof beyond a reasonable doubt with a moral certainty of guilt, the instruction below contained a combination of problematic terms, "honest substantial misgiving" and two references to "moral certainty," which was virtually identical to the combination found unconstitutional in *Cage*. This combination of terms unconstitutionally reduced the state's burden of proving guilt beyond a reasonable doubt.

The North Carolina Supreme Court correctly reviewed the above instruction using the standard set by this Court in *Boyde v. California*, 494 U.S. at 380, and *Estelle v. McGuire*, __ U.S. __, 112 S.Ct. 475, 482 n.4 (1991).[2] The challenged instruction "equated reasonable doubt with a 'substantial misgiving,' which, while not identical to the 'substantial doubt,' or 'grave uncertainty' language condemned in *Cage*, conveyed a nearly identical meaning. More importantly, . . . [the instruction joined the] definition

---

[1] The full instruction on reasonable doubt given in *Bryant* is included as Appendix A. A very similar instruction was given in *State v. Williams*, 334 N.C. 440, 446, 434 S.E.2d 588, 592 (1993) The *Bryant* instruction is *not* North Carolina's Pattern Jury Instruction on reasonable doubt. The reasonable doubt instruction used in *Bryant* was taken from a definition of reasonable doubt stated in an earlier North Carolina decision, *State v. Hammonds*, 241 N.C. 226, 232, 85 S.E.2d 133, 138 (1954).

[2] In *Estelle*, and again in *Sullivan v. Louisiana*, __ U.S. __, 113 S.Ct. 2078 (1993), this Court has acknowledged that there may be some tension between the standard of review articulated in *Cage* and the *Boyde* standard. This issue is not presented by the case at bar. Following this Court's affirmation of the *Boyde* standard in *Estelle*, the North Carolina Supreme Court applied the more rigorous *Boyde* test to the challenged instruction. *State v. Bryant*, 334 N.C. at 341-342, 432 S.E.2d at 296.

of a reasonable doubt as an 'honest substantial misgiving' with a requirement that to convict the jury must be convinced to a 'moral certainty,' rather than an evidentiary certainty. . . . [T]he 'moral certainty' test [was stated] two separate times in the instruction. While the instruction [above] . . . was not identical to the instruction held unconstitutional in *Cage*, the . . . combination of terms [was] so similar to the combination disapproved in *Cage* that there is a reasonable likelihood that a jury [would apply] the challenged instruction in a way that violated the Due Process Clause. *See Estelle v. McGuire*, 502 U.S. ___, 116 L.Ed. 2d 385, 399 n.4." *State v. Montgomery*, 331 N.C. 559, 573, 417 S.E.2d 742, 750 (1992);[3] *State v. Bryant*, 334 N.C. at 341-42, 432 S.E.2d at 296 (adopting the argument set forth in *Montgomery*). North Carolina's application of *Cage* to the instructions below, using the standard set by *Boyde* and *Estelle*, was sound and proper.

Petitioner mischaracterized the division in authority among the jurisdictions which have interpreted *Cage*. Petition at 14-16. The primary issue which has divided jurisdictions is not whether *Cage* should be applied narrowly or broadly, but rather whether equating "proof beyond a reasonable doubt" with "moral certainty of guilt" is itself a violation of due process. *Compare People v. Sandoval*, 14 Cal. Rptr. 2d 342, 841 P.2d 862 (1992), *cert. granted in part*, 114 S. Ct. 40 (1993) (instruction which equated

---

[3] In *State v. Montgomery*, decided before *Bryant* and *Williams*, two Justices of the North Carolina Supreme Court held that an instruction on reasonable doubt which was nearly identical to the instruction in *State v. Bryant* and *State v. Williams*, was unconstitutional under *Cage*. *State v. Montgomery*, 331 N.C. at 573, 417 S.E.2d at 750. Three other Justices, forming a majority, concurred in awarding defendant a new trial on other grounds and did not reach the *Cage* issue. Because of the divided basis of the decision, the North Carolina Supreme Court did not consider the opinion in *Montgomery* to be binding precedent on the issue of the constitutionality of the reasonable doubt instruction. *See State v. Bryant*, 334 N.C. at 341, 432 S.E.2d at 296.

Petitioner mistakenly stated that the instruction on reasonable doubt in *Montgomery* "contained two references to moral certainty and . . . one to [the term] 'an actual substantial misgiving.'" Petition at 22. In fact, the *Montgomery* instruction used the same language as the challenged instruction in *Bryant*, that is, it contained references to moral certainty in combination with the phrase, "honest, substantial misgiving." *Montgomery*, 331 N.C. at 570-71, 417 S.E.2d at 748-49.

standard of proof beyond a reasonable doubt with a "moral certainty" of the truth of the charge not sufficiently similar to *Cage* to warrant reversal); *People v. Jennings*, 279 Cal. Rptr. 780, 807 P.2d 1009, *cert. denied*, __ U.S. __, 112 S. Ct. 443 (1991) (same); *State v. Hoffman*, 123 Id. 638, 851 P.2d 934 (1993) (same) (petition for cert. filed, No. 93-5784); *State v. Morman*, 505 N.W.2d 593 (Minn. 1993) (same); *State v. Williams*, 313 Or. 19, 828 P.2d 1006, *cert. denied*, __ U.S. __, 113 S. Ct. 171 (1992) (same); *Bradford v. State*, 261 Ga. 833, 412 S.E.2d 534 (1992) (same); *Starr v. State*, 201 Ga. App. 73, 410 S.E.2d 180 (1991) (same); *Commonwealth v. Beldotti*, 409 Mass. 553, 567 N.E.2d 1219 (1991) (same); *with People v. Melito*, 601 N.Y.S.2d 745 (A.D. 4 Dept. 1993) (instruction equating reasonable doubt with a lack of moral certainty violated *Cage*); *see also State v. Young*, 853 P.2d 327 (Utah 1993) (instruction equating proof beyond a reasonable doubt with a non-evidentiary standard phrased as 'an abiding conviction . . . such as you would be willing to act upon in the more weighty and important matters relating to your own affairs' violated *Cage*).

The case at bar does not present the question of whether a reference to moral certainty is enough to invalidate an instruction on reasonable doubt. The decision below involved a straightforward, noncontroversial application of *Cage* to a combination of terms which together implied that a more stringent standard of doubt was required for acquittal than 'reasonable doubt.' The instruction condemned in this decision was very similar to the instruction on reasonable doubt held unconstitutional in South Carolina, which this Court declined to review. *See State v. Manning*, 305 S.C. 413, 409 S.E.2d 372 (1991), *cert. denied*, __ U.S. __, 112 S.Ct. 1282 (1992) (holding that instruction which equated reasonable doubt with "a substantial doubt for which honest people can give a real reason" in combination with references to moral certainty

violated due process). The opinion below was sound and respondent respectfully requests that this Court decline to review the lower court's decision.[4]

II. THE NORTH CAROLINA SUPREME COURT NEITHER MISAPPLIED SULLIVAN V. LOUISIANA NOR ABANDONED THE STANDARD OF REVIEW FOR JURY INSTRUCTIONS SET FORTH IN BOYDE V. CALIFORNIA; NORTH CAROLINA PROPERLY RELIED ON SULLIVAN IN HOLDING THAT CAGE ERROR WAS PLAIN ERROR AS A MATTER OF STATE LAW.

Contrary to Petitioner's assertion, Petition at 23-29, the North Carolina Supreme Court did not misinterpret *Sullivan v. Louisiana*, ___ U.S. ___, 113 S. Ct. 2078 (1993). Moreover, *State v. Bryant*, 334 N.C. 333, 432 S.E.2d 291 (1993) did not apply a standard of review that was inconsistent with *Boyde v. California*, 494 U.S. 370 (1990) or *Estelle v. McGuire*, __ U.S. __, 112 S. Ct. 475, 482 n.4 (1991). Petitioner wrongly implied that *Sullivan* in some way led the North Carolina Supreme Court to abandon the *Boyde\Estelle* standard for reviewing jury instructions. Petition at 27. In fact, *Bryant* properly relied on both the *Boyde\Estelle* test and *Sullivan* in different portions of the opinion.

In *Bryant*, there was no objection at trial to the instruction on reasonable doubt. Thus, in finding reversible error, the North Carolina Supreme Court was required by state law to apply a three-part test. First, the court determined that defendant's failure to preserve the error at trial did not bar appellate review because the alleged error was "plain error" under North Carolina's plain error rule. *State v. Bryant*, 334 N.C. at 339-340, 432 S.E.2d at 295. Second, the court found error; at this stage of its analysis, the

---

[4] As an alternative to granting a writ of certiorari, Petitioner requested this Court to hold the cases below pending the outcome of *Sandoval*. Because the question presented by the instant cases is easily distinguishable from the question presented in *Sandoval*, there is no reason to hold these cases. Respondent respectfully requests that this Court deny review.

court below properly relied on the *Boyde/Estelle* test for reviewing jury instructions in holding that the challenged instruction was unconstitutional under *Cage*. *State v. Bryant*, 334 N.C. at 341-342, 432 S.E.2d at 296. Third, the court below determined that the error was reversible, citing *Sullivan*, which held that *Cage* error cannot be harmless because it is structural error that always invalidates a conviction. *State v. Bryant*, 334 N.C. at 343, 432 S.E.2d at 297; *see Sullivan v. Louisiana*, __ U.S. at ___, 113 S. Ct. at 2082-83.

Petitioner's mistaken contention that *Sullivan* in some way affected or altered the standard of review which North Carolina applies to jury instructions resulted from a confusion and conflation of the separate steps explained above. *See* Petition at 26-27. *Sullivan* had no impact on the substantive, second step of the lower court's analysis; with respect to the question of whether the challenged instruction was erroneous under *Cage*, the court below properly applied the *Boyde/Estelle* standard.[5] Thus, *Bryant* in no way abandoned the *Boyde/Estelle* test.

Bryant's reliance on *Sullivan* in the third step of the analysis was correct and unproblematic. *Sullivan* holds as a matter of federal constitutional law that *Cage* error is structural error which nullifies the jury verdict; thus, this type of error is reversible *per se* and cannot be subject to a harmless error review. *Sullivan v. Louisiana*, __ U.S. __, 113 S. Ct. at 2082. In determining that the instruction deemed erroneous under *Cage* was reversible error, the court below simply followed the mandate of *Sullivan*.

As explained in more detail below, the North Carolina Supreme Court also relied on *Sullivan* in deciding that alleged *Cage* error was plain error which could be reviewed despite defendant's failure to object to the challenged instruction at trial. The

---

[5] This step of the analysis is discussed in more detail in Argument I of this Brief.

lower court's decision to apply North Carolina's "plain error" rule in *Bryant* is a state law matter which is not appropriate for review by this Court.

North Carolina recognizes a plain error exception to its procedural default rules. Plain error is defined under North Carolina law as:

> 'fundamental error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done,' or 'where the error is grave error which amounts to a denial of a fundamental right of the accused', or the error has 'resulted in a miscarriage of justice or in the denial of appellant to a fair trial,' . . . or where it can be fairly said 'the instructional mistake had a probable impact on the jury's finding that the defendant was guilty.'

State v. Odom, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983) (quoting *United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir.), *cert denied*, 459 U.S. 1018 (1982)); *See also* North Carolina Rule of Appellate Procedure 10(c)(4) ("[i]n criminal cases, a question which was not preserved by objection noted at trial . . . nevertheless may be made the basis of an assignment of error where the judicial action questioned is specifically and distinctly contended to amount to plain error"). *Odom* creates a two prong test; plain error is either fundamental error which resulted in a miscarriage of justice, or error which had a probable impact on the jury's finding of guilt. *State v. Odom*, 307 N.C. at 660, 300 S.E.2d at 378.

Relying on *Sullivan*, which explained that a jury verdict rendered in violation of *Cage* is not a jury verdict within the meaning of the Sixth Amendment, *Bryant* held that *Cage* error was fundamental error under the first prong of *Odom*. *Bryant* concluded that *Cage* error was plain error as a matter of North Carolina law, which simply means that it is an error that can be reviewed on appeal despite the absence of an objection at trial. *See State v. Bryant*, 334 N.C. at 340, 432 S.E.2d at 295.

North Carolina's plain error rule is a state-made exception to state law on procedural default; whether the lower court correctly applied its plain error rule in *Bryant* is a state-law matter which this Court should decline to review. *See Henry v. Mississippi*, 379 U.S. 443, 446 (1965) (this Court will decline to review state court judgments which rest on independent and adequate state procedural grounds); *Herb v. Pitcairn*, 324 U.S. 117 (1945) (Illinois venue rules not subject to review by this Court).[6]

In sum, *Bryant* did not misapply *Sullivan* and did not abandon the *Boyde\Estelle* test. *Bryant* correctly relied on both *Boyde* and *Sullivan* at different points in the analysis.

CONCLUSION

For reasons stated herein, respondent respectfully requests that the Petition for Writ of Certiorari be denied.

---

[6] Principles of comity also compel restraint; the North Carolina Supreme Court's use of its plain error rule is a critical part of the fair and orderly administration of justice in the state and this Court should decline to interfere with the lower court's decision to rely upon this rule. *See Fay v. Noia*, 372 U.S. 391, 438 (1963) (as a matter of comity, federal courts may decline relief to a *habeus* applicant where the applicant deliberately by-passed the orderly procedure of the state courts).

Respectfully submitted, this the 1st day of February, 1994.

Gordon Widenhouse*
Assistant Appellate Defender

Janine Crawley
Assistant Appellate Defender

Office of the Appellate Defender
1905 Meredith Drive, Suite 200
Durham, North Carolina 27713
(919) 560-3282

COUNSEL FOR RESPONDENTS

**counsel of record*

APPENDIX

JUDGE BROWN'S CHARGE TO THE JURY.

THE COURT: All right. Ladies and gentlemen of the Jury, all the evidence has been presented and it is now your duty to decide from that evidence what the facts are.

You must apply the law which I give you to those facts.

And it's necessary that you understand and apply the law as I give it to you, and not as you think it is or as you might like it to be.

This is important because justice requires that everyone tried for the same crime be treated in exactly the same way and have the same law applied to him.

[The defendant has entered a plea of not guilty.

The fact that he has been charged is no evidence of guilt.

Under our system of justice, when a defendant pleads not guilty, he is not required to prove his innocence. He is presumed to be innocent.

The State must prove to you that the

defendant is guilty beyond a reasonable doubt.

A reasonable doubt is not a mere possible doubt, for most things that relate to human affairs are open to some possible or imaginary doubt.

A reasonable doubt is not a vain, imaginary or fanciful doubt, but it is a sane, rational doubt arising out of the evidence or lack of evidence or from it's deficiency.

When it is said that the Jury must be satisfied of the defendant's guilt beyond a reasonable doubt, it is meant that they must be fully satisfied or entirely convinced or satisfied to a moral certainty of the truth of the charge.

If, after considering, comparing and weighing all the evidence, the minds of the jurors are left in such condition that they cannot say they have an abiding faith to a moral certainty in the defendant's guilt, then they have a reasonable doubt; otherwise not.

A reasonable doubt, as that term is employed in the administration of criminal law, is an honest substantial misgiving generated by the insufficiency of the proof.

An insufficiency which fails to convince your judgment and confidence and satisfy your reasons as to the guilt of the accused.

It is not a doubt suggested by the ingenuity of counsel or by your own ingenuity not legitimately warranted by the testimony or one born of merciful inclination or disposition to permit the defendant to escape the penalty of the law or one prompted by sympathy for him or those connected with him.

You are the sole judges of the credibility of each witness.

You must decide for yourselves whether to believe the testimony of any witness.

You may believe all or any part or none of what a witness has said on the stand.

In determining whether to believe any witness, you should apply the same tests of truthfulness which you apply in your everyday affairs.

As applied to this trial, these tests may include the opportunity of a witness to see, hear, know or remember the facts or